United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1049

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ARTHUR BRECHT,

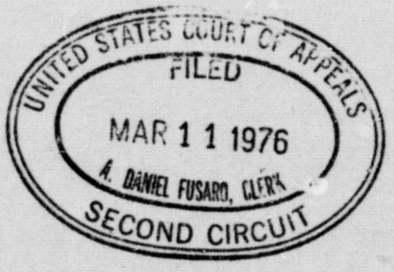
Defendant-Appellant.

B P/S

Docket No. 76-1049

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the New York State misdemeanor of commercial bribery is punishable as a Federal felony under the Travel Act.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a conviction rendered January 23, 1976, after jury trial in the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein) finding appellant guilty of one count of affecting commerce by extortion, in violation of 18 U.S.C. §1951 (Count One), and two counts of traveling in interstate commerce with intent to carry on certain unlawful activity, having thereafter performed said activity, in violation of 18 U.S.C. §1952 (Counts Four and Six[1]). Appellant Brecht was sentenced to concurrent two-year terms of incarceration, execution of which was suspended, and to concurrent three-year periods of probation.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

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[1] On the Government's motion Counts Two, Three, and Five were dismissed (Transcript of Sentencing, dated January 23, 1976, at

Statement of Facts

Appellant was charged[2] with one count of extortion affecting interstate commerce, in violation of 18 U.S.C. §1951 (The Hobbs Act), and two counts of traveling in interstate commerce intending, and in fact carrying on, the unlawful activity proscribed by New York State law of extortion or bribery, in violation of 18 U.S.C. §1952 (The Travel Act). The Government's theory of the case was that appellant solicited and accepted a "kickback" in exchange for a promise to award a commercial contract.

At the time of the charged offense appellant was employed by the Westinghouse Electric Corporation, Power Generating Systems Company, located in Lester, Pennsylvania (30[3]). He was assigned to the Gas Turbine Division, where he was manager of the Technical Publications Group (30-31). It was appellant's responsibility to produce technical manuals or instruction books to explain the care and maintenance of Westinghouse equipment to the purchasers of such equipment (32-34A).

As to each manual, appellant was the person who decided whether it would be produced "in house" by Westinghouse or

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[2]The indictment is B to appellant's separate appendix.

[3]Numerals in parentheses refer to pages of the transcript of trial.

prepared by a subcontractor (36). If the material was to be prepared by a subcontractor, appellant made the initial selection, usually after a bidding procedure, of the firm which would be awarded the subcontract. Appellant's recommendation was accepted by his superior in 99% of the bids awarded (37).

In September 1973 Westinghouse had entered into a contract with El Paso Electric Company to provide a power generating plant at Newton Station, Texas (42-43). According to the Westinghouse work schedule, the accompanying instruction manuals were due in March 1975 (63). After it was decided that the manuals were to be produced by a subcontractor, several bids were received (45-46). National Technical Publications (NTP), a New York company, was one of the companies competing for the contract, and NTP filed a bid on October 31, 1974 (46). According to the testimony, NTP did other business outside New York. Its expenses included the cost of maintaining an office in Florida (172) and payments to illustrators and writers, some of whom were in California (167).

The Government introduced into evidence tape recordings of two conversations between appellant and Joseph Racker, the president of NTP. These conversations were said to have occurred in New York on December 23 and 27, 1974, two dates on which the expense sheets of Westinghouse indicated that appellant had traveled to New York on business[4] (69). The tapes

[4]Appellant was frequently in New York, where he maintained a house for his wife and children (83-84).

were made with Racker's consent and assistance. Racker was then under a Federal indictment charging forty-three counts of kickbacks to employees involved in Federal contracts with Grumman Aircraft[5] (129-130). In the tape[6] of December 23, the conversation was, in pertinent part:

> BRECHT: There's something wrong
>
> RACKER: In all the years we've dealt together, we never got involved with any payments or anything like that.
>
> BRECHT: I never asked for anything.
>
> RACKER. I know you never did, we never, that's why
>
> BRECHT: Really
>
> RACKER: By me, you shocked me the other day when this whole thing came up because
>
> BRECHT: Well
>
> RACKER: It never happens to me.
>
> BRECHT: It's not, it's not
>
> RACKER: I've never done this before
>
> BRECHT: It's not exactly my own choice.
>
> RACKER: I know, I -- I said to myself it can't be Artie doing this, I really did, don't think
>
> BRECHT: Yeah

---

[5]At the time of Brecht's trial Racker had died of natural causes (135).

[6]Transcripts of the tapes were introduced into evidence (136, 202), and will be docketed by stipulation as part of the record on appeal.

RACKER: I don't believe you're doing this.

BRECHT: You know

RACKER: Unless somebody's holding a, a -- a gun to your head

BRECHT: Yeah, well, you know, you kinda cooperate, Joe, you know, at my level you gotta do what the people up above want done, you know

RACKER: Yea, well, uh.

BRECHT: Whatever it is.

RACKER: And you mean they wouldn't give me that contract unless I did this, right.

BRECHT: That's it, you know, that's it.

RACKER: Well, if I gave it to you, I get the contract the first of the year

BRECHT: Right.

RACKER: That's what they said to you, huh.

BRECHT: Right.

Tape transcript, 13-15.

RACKER: Well, let me ask you this, at least, so, I have to, and they insist on a thousand dollars before I even get the purchase order, huh?

BRECHT: That's right, right.

RACKER: And, but they will get it to me by January first?

BRECHT: You'll get it, the first week in January.

RACKER: First week in January, yeah, if I don't pay I don't get it, right

BRECHT: That's it

RACKER: I can't get it unless I pay.

BRECHT: That's what I'm telling you.

RACKER: That's the way it works, huh.

BRECHT: Yeah.

Tape transcript, 25.

It was the Government's position that this conversation related to a kickback for the contract to produce the manual. The same tape revealed that appellant was to sell Racker 215 shares of stock (Tape transcript, 35). Racker postponed these transactions because the person to whom he would in turn sell the stock had not yet come through with the money (Tape transcript, 26).

In the December 28, 1974, conversation, Racker indicated that he had the agreed-upon $1,000 -- $500 in cash and a $500 check (Tape transcript, 5).

Appellant was arrested on December 27, 1975, as he was leaving the meeting with Racker (193). When the agents searched him they found the $500 check and $500 in cash (206-207). The defense position was that this money was not a kickback, but was part of a legitimate stock transaction.

While the Government's witness, John McGary, asserted that he believed that the stock appellant sold to Racker was worth approximately ten to fifty cents a share (214), on cross-examination it was revealed that the financial report of the company indicated a stock option plan valuing the stock at $4.50 a share (223, 227).

Over defense objection Agent Kelleher was permitted to testify as to the substance of a conversation he had with Joseph Racker on December 27 prior to Racker's meeting with appellant (253). The hearsay testimony was permitted to establish Racker's state of mind at the time of the meeting (254, 258). Since Racker's death precluded his testimony at trial, Kelleher's hearsay testimony was introduced with a limiting instruction. Kelleher reported that Racker had said that appellant had asked for a "kickback" and further that Racker had said he was going to pay appellant $1,000 "up front." Of the stock transfer, Kelleher testified that Racker had told him the shares were worthless (265).

On cross-examination it was revealed that at the time of this statement Racker was under great strain as a result of the pending indictment against him (270-271) and that he was expecting this conduct to inure to his benefit.[7]

At the close of the Government's case defense counsel moved for a judgment of acquittal on the grounds, inter alia, that commercial bribery was not a crime within the ambit of §1952 (282-288). The motion was denied (288). The defense rested (282).

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[7] In fact, it did. Racker was permitted to plead to only six counts of the forty-three count indictment (130).

In his charge to the jurors[8] on the Travel Act violations in Counts Four and Six of the indictment, Judge Weinstein instructed that in order to convict, the jurors had to find appellant guilty of extortion in violation of Penal Law §155.05 or of commercial bribery in violation of Penal Law §180.05. The Judge defined extortion pursuant to the penal law thus:

> By extortion, a person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his business, calling, career, financial condition, etc.
>
> (373).

He then defined commercial bribery as follows:

> "An employee, agent or fiduciary is guilty of commercial bribe receiving when, without the consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs."
>
> (373).

He further instructed the jurors:

> That is a felony in New York, to take a bribe even though you're working for a private corporation on the understanding that it will effect what you do for your employer.

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[8]The entire charge is C to appellant's separate appendix.

> The solicitation of money or an agreement to accept money in exchange for an award of a subcontract is done without the consent of Westinghouse and there was testimony, you remember, on that point. If it was done without the consent of Westinghouse it would constitute a violation of this statute.
>
> (374).

After deliberation, the jury returned with a guilty verdict on Count One but, at that time, it had not been able to reach a verdict as to Counts Four and Six (383-385). After further deliberation, the jury returned with a guilty verdict on those two counts (388).

ARGUMENT

THE NEW YORK STATE MISDEMEANOR OF COMMERCIAL BRIBERY IS NOT PUNISHABLE AS A FEDERAL FELONY UNDER THE TRAVEL ACT.

The indictment charged, and the District Judge instructed, that "commercial bribery" as defined in N.Y. Penal Law §180.05 was a predicate upon which the jury could find guilt under the Travel Act, 18 U.S.C. §1952. This is error mandating reversal of the conviction on Counts Four and Six of the indictment.

Title 18, U.S.C. §1952, entitled "Interstate and foreign travel or transportation in aid of racketeering enterprises," provides, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate commerce, including the mail, with intent to --
>
> * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraph* * * (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the

> laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

While the Act specifically proscribes "bribery" in violation of State laws, at common law that crime did not include commercial bribery, and the laws of New York State treat bribery and commercial bribery so differently from one another as to prevent their similar treatment under the Travel Act.

At common law "bribery" is the offense of giving or receiving money or anything of value in return for which a public officer agrees to do or refrain from doing an act contrary to his legal duty.[9] 3 WHARTON'S CRIMINAL LAW & PROCEDURE, §1380 (R.Anderson ed. 1957); 1 Burdick, CRIMES, §288 (1946).

Reflective of this definition is N.Y. Penal Law §200.00, which defines bribery, a Class "D" felony, as conferring a benefit on a public official.[10] The New York courts have held that the essence of bribery is the wrong to the public caused by corruption of the public service. People v. Chapman, 13 N.Y.2d 97 (Ct. of App. 1963). Consequently, the crime of bribery is

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[9] In 1648 Coke defined "bribery" as the offense committed "when any man in judicial place takes any fee or pension, robe, or livery, gift, reward or brocage of any person, that hath to do before him any way, for doing his office, or by colour of his office, but of the king only, unlesse it be of meat and drink, and that of small value...." 3 Coke, INSTITUTES 145 (1648).

[10] The counterpart to this provision is N.Y. Penal Law §200.10, which makes criminal the receipt, by a public official, of any money or thing of value.

punishable by as much as a seven-year period of incarceration. N.Y. Penal Law §70.00(2)(d).

At this juncture it is instructive to note that in United States v. Nardello, 393 U.S. 286, 293 n.11 (1969), the Government argued that "bribery," as used in the Travel Act, "focused on corrupt activities of public officials."

By contrast, the gravamen of "commercial bribery," an offense relatively new to the criminal law,[11] is the corruption of employer-employee relationships in the private sector (N.Y. Penal Law §180.05). The offense is classified as a Class "B" misdemeanor[12] and is punishable by no more than a three-month period of incarceration. N.Y. Penal Law, §70.15(2).[13]

In light of the distinctions between bribery and commercial bribery, extension of the Travel Act to include the latter will produce an absurd result: a New York State misdemeanor would thereby be transformed into a Federal felony punishable by five years in prison and a $10,000 fine. In Rewis v. United States, 401 U.S. 808, 812 (1971), the Supreme Court recognized that a broad interpretation of the provisions of the Travel

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[11] New York enacted the first commercial bribery statute in 1881. Note: Control of Non-Governmental Corruption by Criminal Legislation, 108 U. of Penn. L.R. 848 (1959-1960).

[12] Judge Weinstein's characterization of commercial bribery as a "felony" is simply an error.

[13] Alternatively, the offense carries a maximum one-year term of probation. N.Y. Penal Law §65.00.

Act would permit just such an unfair result, and consequently the Court restricted the application of the statute.

In addition to the language of the Act and the effect of its application, further evidence that the Travel Act contemplates proscribing only common law "bribery in violation of State law" appears in the legislative history of the Act.[14] Throughout, the recurring references to "bribery" appear in conjunction with "official corruption."

For example, Attorney General Robert F. Kennedy discussed the crimes covered by the statute as "gambling, prostitution, bribery and corruption of local officials." Hearing on S.1653-8 and S.1665 before the Senate Committee on the Judiciary (hereinafter "Hearing"), 87th Cong., 1st Sess. (1961), at 11. Similarly, he explained in his statement in support of the House of Representatives' version of the bill (H.R.6572):

> Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling. From these gambling profits flow the funds to bankroll the other illegal activities mentioned, including the bribery of local officials.* * * [The statute] is also aimed at the huge profits in the traffic in liquor, narcotics, prostitution, as well as the use of these

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[14]It is instructive to note that at the time Congress enacted §1952, as many as twenty-five states had no laws punishing commercial bribery. Control of Non-Governmental Corruption by Criminal Legislation, supra, 108 U. of Penn. L.R., Appendix at 864-866. Therefore, a Travel Act conviction based on a commercial bribery offense would be a matter of geographical happenstance. See Rewis v. United States, supra, 401 U.S. at 812.

> funds for corrupting local officials and their use in racketeering in labor and management.
>
> Congressional Record, 87th Cong., 1st Sess., Vol. 107 at 8580-8581. Emphasis added.

The same understanding of the scope of "bribery" appears in a letter from then Deputy Attorney General Byron R. White to the House Judiciary Committee, written in response to a House-proposed restriction on the act. In the letter, White cautioned that the amendment

> ... eliminated from the purview of the bill extortions not related to the four above offenses but which are, and have historically been, activities which involve organized crime. Such activities are the "shakedown racket," "shylocking" (where interest of 20% per week is charged and which is collected by means of force and violence, since in most cases the loans are uncollectable in court) and labor extortion. It also removes from the purview of the bill the bribery of state, local and federal officials by the organized criminals unless we can prove that the bribery is directly attributable to gambling, liquor, narcotics or prostitution.
>
> Emphasis added.

United States v. Nardello, supra, 393 U.S. at 291-292; Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L.R. 37, 41 (1962).

Moreover, statements made during the Senate hearing indicate that the intention throughout was to limit the Act to crimes traditionally associated with behavior of organized crime and with traditional definitions of the crimes listed.

Thus, at the outset Attorney General Kennedy assured the Senators that

> ... we do not seek to preempt the field or interfere in any way with the traditional responsibilities of local law enforcement.
>
> Hearings, supra, at 11.

The Attorney General emphasized that the Act, as the title to §1952 reflects, was aimed at control of organized crime,[15] and therefore the offenses enumerated are those with which such criminal elements are most often associated. Hearings, supra, at 11.

Similarly, Assistant Attorney General Herbert Miller explained that since the "Travel bill" was specifically aimed at organized crime, it was intentionally limited to only the types of offenses in which organized criminals are involved. Hearings, supra, at 108.

Significantly, in response to an inquiry by Senator Keating as to why the bill should not be broadened to include other crimes, Assistant Attorney General Miller explained:

> ... I frankly would not want to expand our jurisdiction to the point where we were over-committed from an investigative and

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[15] Specifically, Kennedy said:

> American citizens who are not connected with organized gambling and organized crime have nothing to fear from these bills. The only toes tread on here are those of the racketeers and hoodlums.
>
> Hearings, supra, at 17.

> prosecutive standpoint, and where the line is, I am sure I don't know, but if we add certain additional offenses, then you increase the scope of the investigation, and, of course, subsequent prosecution by the Federal Government.
>
> Hearings, supra, at 13.

This danger inherent in a broad interpretation of the Act -- the over-extension of limited Federal law enforcement resources and of treading on sensitive Federal-State relationships -- was recognized by the Supreme Court in Rewis v. United States, supra, 401 U.S. at 811-812. It was also expressed by Judge Friendly in United States v. Archer, 486 F.2d 670, 679 (2d Cir. 1973). There the concern was that Federal jurisdiction not be extended to encompass crimes wholly within state authority. As an example, Judge Friendly cautioned against the "literal" interpretation of the Act so that it would extend to trivial fixing of a traffic ticket. The rationale of that concern applies to this case. To include "commercial bribery" within the term "bribery" requires not a traditional, but an expansive, interpretation of the meaning of "bribery."

Worthy of consideration is the fact that the Travel Act violations reviewed by this Court have uniformly involved corruption of public officials. United States v. Kahn, 472 F.2d 272 (2d Cir. 1973); United States v. Cassino, 467 F.2d 610 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973); United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970), cert. denied, 402 U.S. 999 (1971); United States v. Corallo, 413 F.2d 1306 (2d Cir.),

cert. denied, 396 U.S. 958 (1969); United States v. Wechsler, 408 F.2d 1884 (2d Cir.), cert. denied, 395 U.S. 978 (1969).

The charge here was wholly within the State's authority to prosecute,[16] and appellant, whose permanent residence was in New York where his wife and children live, was readily susceptible to the New York jurisdiction. Predicating a Travel Act conviction on the State misdemeanor of commercial bribery is error and must be reversed.[17] United States v. Niedelman, 356 F.Supp. 979 (S.D.N.Y. 1973).

The instruction which permitted the jurors to find guilt based on extortion in violation of New York law or the act of commercial bribery will not save this conviction. Fundamental

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[16] Without doubt appellant's actions in either their specific or generic sense are unrelated to organized crime.

[17] United States v. Pomponio, 511 F.2d 953 (4th Cir. 1975), is distinguishable. In Pomponio, the defendants had bribed a vice-president of a bank which, unlike the offense in this case, is a crime itself punishable as a Federal felony. 18 U.S.C. §215. To the extent that Pomponio can be read to hold that commercial bribery is an offense within the purview of the Travel Act, it is simply incorrect, and its reliance on United States v. Nardello, supra, 393 U.S. at 292-293, for that proposition, is misplaced. In Nardello, the Supreme Court rejected the argument that extortion as used in the statute was restricted to a crime committed by public officials. The rationale of the Court's decision was that since the crime of extortion can be committed only by the perpetration of the force or fear, to limit its application to public officers conflicted with the general statutory intent to punish crossing state lines in order to extort. The same rationale does not apply to the crime of bribery since the person offering the bribe can be anyone, not just a public official.

error in any one of alternative theories of guilt mandates reversal.[18] Leary v. United States, 395 U.S. 6, 31 (1969); United States v. Rodriguez, 465 F.2d 5, 10 (2d Cir. 1972).

CONCLUSION

For the foregoing reasons, the conviction on Counts Four and Six must be reversed and the case remanded for resentence on Count One, or retrial on Counts Four and Six.

Respectfully submitted,

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[18] That the jury convicted appellant in Count one of the Federal crime of extortion does not change the result. The Federal crime is different from the State law crime of extortion. The State crime requires a finding that the act threatened would materially hurt the victim without materially benefiting the actor. N.Y. Penal Law §155.05. The Federal crime requires only the use of force or fear. Therefore, there is no basis for concluding that the jury's finding of guilt for the Federal crime meant that they believed him guilty of the State crime.

CERTIFICATE OF SERVICE

March 11, 1916

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Emile Zwibaum